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10/677,029	10/01/2003	Douglas L. Goedeken	P6187US	9524

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/677,029
Filing Date: October 01, 2003
Appellant(s): GOEDEKEN ET AL.

Daniel C. Schulte
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 6/16/10 appealing from the Office action mailed 1/26/10.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 1-3, 6, 10-11, 21-25 and 28-32 are pending and rejected.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

5,451,417	FREYN et al.	9-1995

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2, 10-11, 28-32 are rejected under 35 U.S.C. 102(b) as being anticipated by Freyn et al.

Freyn et al disclose an unproofed frozen dough comprising an acidic active agent, a basic active agent and yeast in amount of 2-20% . The amount of basic leavening agent is from 2.5-4% based on 100% flour and the amount of acidic leavening agent is enough to neutralize the basic ingredient. Example 1 shows 3.55% basic agent and 3.55% acidic agent. The dough products include dinner rolls, bread sticks, cinnamon rolls. The acidic active agent can be selected from the ingredients listed on column 2 lines 50-60. The frozen dough does not need to be thawed or proofed prior to

baking; however, the dough may be thawed and proofed without detracting from the quality of a baked product. The method comprises the step of determining amount of ingredients to form the dough. (see col. 2,3 and col. 5 and the examples)

The amounts of acidic active agent and basic active agent do not define over Freyn et al. because they disclose an amount of 2.5-4% basic active agent based on 100% flour; thus, the amount falls within the range claimed. The acidic agent is required to completely neutralize the basic agent; thus, it is inherently in the same range or a little higher than the basic agent. Thus, the acidic active agent also falls within the claimed range. . Example 6 shows a ratio of 1.70 which falls within the claimed range in claims 28 and 1. The reference discloses all the limitations claimed. The property of being thawed and proof in a retarder at temperature in the range of 32-46 degree is inherent in the Freyn et al dough because it is the same dough containing the same ingredients as claimed. Furthermore, the limitation of " the dough can proof at retarder condition" is not a positive limitation; it is reciting what the dough can do, which is similar to intended use which does not determine the patentability of the product. The claims are directed at an unproofed frozen dough containing the recited ingredients and Freyn discloses such dough.

Claims 3,6, 21- 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Freyn et al.

Freyn et al do not disclose encapsulated basic active, the raw specific volume as claimed and the use of fresh crumbled yeast .

Encapsulated leavening agent is well known in the art as exemplified in the Moder et al reference submitted by applicant. It would have been obvious to one skilled in the art to use encapsulated basic agent when desiring to prevent the action between the leavening acid and leavening base until baking time. It would also have been obvious to use fresh crumbled yeast when desiring a fresh ingredient. As to the specific volume, this parameter can vary depending on the several factors including the amount of leavening agents used, the type of product, the mixing time, the proportions of ingredients used etc.. It would have been obvious to one skilled in the art to determine the appropriate raw specific volume depending on the type of product and the specific texture and taste wanted. Such determination is within the skill of one in the art through routine experimentation. Claims 24-25 are included in the 103 rejection because they depend from claim 6 which is rejected under 103 because Freyn et al do not disclose the yeast used is fresh crumbled yeast. However, all the limitations in claims 24-25 are taught in Freyn et al. The acid leavening agents in Freyn et al include high solubility and low solubility agents and the amounts are within the range claimed. Freyn et al disclose the amount of basic ingredient falling within the range claimed in claim 21. However, Freyn et al do not disclose fresh crumble yeast.

(10) Response to Argument

On page 11 of the appeal brief, appellant argues the claims are not anticipated by Freyn et al because the calculation of the ratio of flour to water must include the water in the liquid egg component. This argument is not persuasive. The prior art is applied according to the broadest interpretation of the claims. Claims 1 and claim 28

recite the ratio of flour to water; thus, the calculation is based on the flour and water. There is nothing in the claims that require that the ratio is based on all components of the dough that contain water. Appellant contends and argues that the ratio of flour to water should also be based on ingredients that contain water such as liquid egg. However, it is noted that the claimed range developed over the prosecution of the application. It is derived from the appellant's examples. The examiner notes that like Freyn et al, the appellants may include other liquid components such as milk or eggs (instant spec. page 13, line 24 to page 14, line 4). Appellant discloses on these pages " **examples of liquid components include water, milk, eggs, and oil or any combination of these**" There is no clear indication from the instant specification that the water derived from other sources such as the flour itself, eggs, or milk need to be taken in to account when determining the ratio of flour to water. These were viewed as additional components and it is not clear that they were required to calculate the ratio. The examiner merely did what the appellants did which is a simple ratio calculation based on example 6 based on the water content. The claims are anticipated by Freyn because they recite a flour to water ratio which is taken to be just flour and water present in the dough, not all source of liquid present in the dough.

The examiner respectfully disagrees with appellant's analysis that the flour to water ratio should include component such as liquid egg; however, even if the liquid egg is taken into the calculation, the claims are still anticipated by Freyn et al. The reference generically discloses water is used in amounts of 40 to 75% , preferably 45 to

65% and egg 5.5 to about 8% preferably 5 to 6% (col. 3 lines 65-68 and column 5, line 30-33). Thus, Freyn et al discloses the following ratios of flour to water:

Freyn et al.
Water to Flour ratio based on 45 to 65% water converts to 1.53 to 2.2
Water to Flour ratio based on 45 to 65% water and 5 to 6% Egg (having 75% water and 25% solids) converts to 49 to 69.5% water based water and egg which gives a ratio of 1.43 to 2.04.
compared to the claimed flour to water range of 1.67 to 1.82. The appellant's range is wholly covered by range taught by Freyn et al. and has a large coextensive component.

The examiner notes that the range claimed sufficiently overlaps the general teaching of the reference and thus anticipates the claimed invention even if the egg is taken in to account.

Appellant uses the examples for the calculation but the examples are only exemplified samples of the reference; it is not the whole teaching of Freyn et al.

On page 13 of the appeal brief, appellant argues the Freyn et al do not disclose a dough composition that is capable of being proofed at retarder conditions. Appellant refers to the declaration filed on Oct. 7, 2008. As indicated in the final rejection mailed on 1/15/09, the declaration filed on 10/7/08 was not considered because it was not legible and appellant did not resubmit the declaration in subsequent responses. As to the property of " can proof at retarder conditions", Freyn et al disclose the same dough containing the same ingredients and the flour to water ratio falling within the range claimed; thus, it is inherent the dough disclosed in Freyn et al has the same property as claimed. Appellant states the dough in Freyn et al does not have an increase in volume by 50%; the claims under the 102 rejection do not have any limitation on " percent increase in volume". In the declaration filed on 3/11/08, appellant shows that the dough

of Freyn et al has an increase in volume from 0-24 hours at 40 degree F and 45 degree F; thus, the dough does proof as retarder conditions as claimed. Appellant states that Freyn et al relate to doughs that are not required to undergo proofing between freezer and oven. Freyn et al disclose on column 5 lines 65-67, " the dough does not need to be thawed or proofed prior to baking, albeit the dough may be thawed and proofed". Thus, the dough of Freyn et al can be proofed; as shown by the declaration filed on 3/11/08, the dough does proof after thawing.

On page 14 of the appeal brief, appellant again argues the flour to water ratio with respect to claims 3,6,21-25. As shown above, the Freyn et al dough does have the flour to water ratio claimed. Appellant also argues the Freyn et al doughs are not capable of retarder-to-oven proofing but are exclusively and very intentionally designed for freezer-to-oven baking performance. On page 15, appellant refers to the declaration filed on 10/7/08 and states that " even if Freyn et al could be used as a starting point, one of skill would not have had any expectation that a dough composition having a flour to water ratio in the range from 1.67 to 1.82 might be capable of being proofed at retarder conditions. Appellant's argument is not persuasive. First of all, the declaration filed 10/7/08 was not considered because it was not legible and appellant did not resubmit the declaration in subsequent responses; thus, the declaration is not of record. However, the declaration filed on 3/11/08 was considered and was not found persuasive. There is no evidence established in the declaration to show that the capability of proofing at retarder conditions stems from the claimed flour to water ratio. The declaration has one composition and show the volume of that example; there are

no repeated formulations in which all the ingredients remain the same except for the flour to water ratio. Thus, there is no evidence to support the conclusion that the ability to proof at retarder conditions results from the flour to water ratio. Also, if the ability to proof at retarder conditions results from the flour to water ratio as claimed, then it is inherent the Freyn et al dough can proof at retarder conditions because the dough has flour to water ratio within the range claimed as explained above. The declaration shows one example of Freyn et al and the data on proofing at 40 degree F and 45 degree F shows that the dough does proof as retarder conditions because the volume increases from time 0-24 hours. Appellant is correct in stating the proofing behavior of the Freyn et al dough is different from the comparative dough labeled as the inventive dough. For this reason, claim 3 is not rejected under 102. It is recognized that the volume of a dough product can vary and the specific volume obtained can be affected by many other factors such as the ingredients used, the amount of mixing, the mixing time, the proportion of ingredient. Different dough product has different volume; for example, a bread dough would have different volume from a pizza dough. This difference is demonstrated in the declaration. The dough formulation termed inventive dough has a different formulation from the Freyn et al.; thus, the volume is different. The initial volumes of the two doughs are different; thus, it is obvious the proofing behavior of the two doughs is different. The declaration supports the inherent position taken with respect to the 102 rejection in showing that the dough does proof at retarder conditions.

On page 16 of the appeal brief, appellant argues the conclusion that varying the volume depending on the type of product and is within the skill of one in the art is

untenable. The examiner respectfully disagrees. A person skilled in the art can readily recognized the volume of dough product varies depending on the types of dough and even within the same type of dough. For example, there are breads that are porous with large air cells and there are breads that are very dense having small air cell. The denseness of the dough or the porous of the dough is the difference in the volume. One also recognizes that the volume of a croissant dough is different from a donut dough because the texture of the two products are different. This conclusion is supported by the showing in the declaration submitted on 3/11/08. The two dough formulations shown in the declaration are different; thus, they have different volumes but both can be proofed even if the proofing profiles are different. The art of baking is well known; thus, determining the optimum volume for the product made would have been within the skill of one in the art and appellant has not presented any reason or showing to the contrary. The specific volume obtained and the ability to be proofed at retarder conditions are two separated issues. Appellant's declaration clearly demonstrates that the Freyn et al dough can be proofed at retarder conditions. Furthermore, the declaration only shows 1 example of Freyn which is not sufficient to make a general conclusion of the total disclosure of Freyn.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lien T Tran/

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/Keith D. Hendricks/
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Donald Tarazano